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No. 89-464

In The

Supreme Court of the United States

October Term, 1989

GEORGE W. WILSON, *et al.*,

Petitioners,

v.

PAT CANTERINO, a/k/a
PAT WILLIAMS, *et al.*,

Respondents.

AMICUS BRIEF FOR THE STATES OF TENNESSEE, ARIZONA, ARKANSAS, FLORIDA, IDAHO, IOWA, KANSAS, MICHIGAN, MISSOURI, NEW JERSEY, OHIO, SOUTH DAKOTA AND WYOMING IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether an order to hire private counsel to assist female inmates is constitutionally improper under the due process clause or the equal protection clause when the remedial order also directs specific improvements which created identical resources for access to the courts to female and male inmates.

II.

Whether affirmative sex-conscious relief granted to female inmates in an action under 42 U.S.C. § 1983 is constitutionally improper when the record is devoid of any evidence of an intent to discriminate and resources identical to those available to male inmates were ordered.

III.

Whether the equal protection clause, when applied in a female penal institution, requires equality rather than parity of treatment among female and male inmates.

IV.

Whether an order to hire private counsel to assist female inmates is constitutionally improper when the court failed to limit the duties of private counsel and set no standard by which such affirmative relief could end.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF AMICI STATES 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT:

I. IMPOSITION OF AFFIRMATIVE SEX-CONSCIOUS RELIEF AT THE KENTUCKY WOMEN'S CORRECTIONAL INSTITUTION FOR WOMEN BY THE SIXTH CIRCUIT PURSUANT TO THE EQUAL PROTECTION CLAUSE WITHOUT A SHOWING OF AN INTENTION TO DISCRIMINATE BY CORRECTIONAL OFFICIALS IS AN IMPORTANT CONSTITUTIONAL ISSUE WHICH NEEDS TO BE SETTLED BY THIS COURT 4

II. THE DECISION OF THE SIXTH CIRCUIT IN THIS CASE CONFLICTS WITH THE DECISION OF AT LEAST ONE OTHER CIRCUIT REGARDING THE REQUIREMENT OF A FINDING OF DISCRIMINATORY PURPOSE IN AN EQUAL PROTECTION CLAIM WITHIN THE CONTEXT OF INMATE LAWSUITS 9

CONCLUSION 11

TABLE OF AUTHORITIES

Pages

CASES CITED:

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) 8

Pitts v. Thornburgh, 866 F.2d 1450 (D.C. Cir. 1989) 9, 10

Washington v. Davis, 426 U.S. 228 (1976) 7

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The amici states urge that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-titled proceeding on April 10, 1989. The decision is unreported, but reprinted at pages 2a-12a of the Appendix to the Petition for Writ of Certiorari by George W. Wilson, *et al.* The petition for rehearing *en banc* was denied on June 22, 1989.

INTEREST OF AMICI STATES

All of the amici states have separate correctional institutions for women.[1] Of particular concern and interest to the amici states is the Sixth Circuit's application of the equal protection clause in affording affirmative "sex-conscious" relief without any finding of an intent to discriminate by the Kentucky prison officials. In the broader context, the application of the Sixth Circuit's analysis to any other programs provided at men's correctional facilities which may not be provided at women's correctional facilities is of particular concern.

Requiring states to provide women's correctional facilities with part-time attorneys to assist female inmates in filing lawsuits against state correctional officials in order to "catch up" with the frequency of lawsuits filed by male inmates would undoubtedly create needless and unnecessary litigation for state women's correctional facilities across this country.[2] All of the amici states are endeavoring to provide both men's and women's correctional facilities with adequate resources to enable both male and female inmates to bring lawsuits if necessary.

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[1] The Sixth Circuit decision may also impact upon the federal corrections system which has separate correctional facilities for women.

[2] Indeed, as Judge Suhrheinrich stated in his concurring opinion in this case, "[t]he affirmative relief ordered by the district court seems most likely to result in a further proliferation of baseless suits, rather than achieving the intended effect of providing female inmates with equal and constitutionally necessary access to the courts." *Canterino v. Wilson. et al.*, p. 10a (Appendix to Petition for Writ of Certiorari).

However, it is the position of the amici states that there is no constitutional requirement that they should be required to provide women's correctional facilities with the necessary resources including part-timed attorneys to "equalize" the frequency of lawsuits filed by female inmates with the frequency of lawsuits filed by male inmates in the absence of a showing of an intent to discriminate against female inmates. To do so would be to provide unnecessary affirmative relief where there has been no finding of a violation of the equal protection clause.

More importantly, if the analysis of the Sixth Circuit stands, state correctional officials under the equal protection clause of the Fourteenth Amendment could be required to "equalize" other programs between men's and women's correctional facilities, even in the absence of a showing of an intent to discriminate against the women inmates. There are a number of legitimate reasons why the programs in men's correctional facilities may be different than programs in women's correctional facilities. The Sixth Circuit's decision imposes new and constitutionally unnecessary additional burdens on state correctional officials whose budgets are already stretched to the limit in complying with other mandates of the Constitution. Thus, the amici states have a significant interest in the outcome of this case and will endeavor to show this Court the importance of this case and urge this Court to grant the petition for writ of certiorari.

STATEMENT OF THE CASE

The amici states rely upon the statement of the case as presented by George W. Wilson, *et al.*, in their petition for writ of certiorari at pages 4-11, in lieu of presenting their own statement of the case.

REASONS FOR GRANTING THE WRIT

I. IMPOSITION OF AFFIRMATIVE SEX-CONSCIOUS RELIEF AT THE KENTUCKY WOMEN'S CORRECTIONAL INSTITUTION FOR WOMEN BY THE SIXTH CIRCUIT PURSUANT TO THE EQUAL PROTECTION CLAUSE WITHOUT A SHOWING OF AN INTENTION TO DISCRIMINATE BY CORRECTIONAL OFFICIALS IS AN IMPORTANT CONSTITUTIONAL ISSUE WHICH NEEDS TO BE SETTLED BY THIS COURT.

The key language of the Sixth Circuit's decision with respect to this case is as follows:

> The cases on other jurisdictions which appear to conflict with our decision here are distinguishable from this case for one important reason: none involved a finding by the district court that there was an equal protection violation in that women inmates have less satisfactory access to the courts than male inmates. [Citations omitted]. The Fourteenth Amendment "requires, even in the context of prison conditions, that any such disparity [between the treatment of male and female inmates] must 'serve important governmental objectives' and must 'substantially relate to achievement of those objectives.' [Citation omitted]. Further, the "cost of protecting a constitutional right cannot justify its total denial."

Canterino v. Wilson, et al., pp. 8a-9a (Appendix to Petition for Writ of certiorari).[3]

Based upon this analysis, the Sixth Circuit affirmed the district judge's imposition of affirmative "sex-conscious" relief which requires Kentucky correctional officials to hire a part-time attorney for 18 months to provide legal assistance to women inmates at the Kentucky women's correctional institution. There is no dispute that there is a disparity between the frequency with which female inmates file lawsuits in Kentucky as opposed to male inmates. However, there is also no dispute that "no inmate testified that they wanted any legal services that they had not been able to receive [and] male inmates in Kentucky do not have an attorney assigned to their prisons." *Id.* at 3a.

Of troublesome significance is the fact that neither the district court nor the Sixth Circuit made any finding that Kentucky correctional officials intentionally discriminated against female inmates in creating this disparity. The mere existence of the disparity was sufficient for the Sixth Circuit to affirm the district court's imposition of affirmative "sex-conscious" relief against Kentucky correctional officials. Such a holding is a significant shift in the way in which prisoner equal protection claims are adjudicated. In that regard, Judge Guy in his dissenting opinion stated the following:

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[3] In distinguishing the "access to courts" cases cited by the Kentucky Corrections officials from the present case by relying upon the equal protection claim, the Sixth Circuit rests the holding of the case on equal protection not "access to court" grounds.

> As I understand the court's rationale, it found that the women had been denied meaningful access because they had not been provided the same access as the male inmates. This rationale does not withstand scrutiny. Initially, in order to establish an equal protection violation, plaintiffs must show that the state intentionally discriminated against women prisoners as a group for no legitimate reason. It is undisputed that, prior to the consent decree entered in the men's case in 1981, the law libraries at both KSR and KSP were also "woefully inadequate," therefore, at most, the male inmates enjoyed the benefit of a constitutionally adequate library for two years longer than the female inmates at KCIW. Furthermore, as the court pointed out in 1982, the Kentucky prison system housed a minimum of 2400 male prisoners and only 150 female inmates. Undoubtedly it is an historical fact that, due to the extremely disproportionate number of male inmates, the men have, by virtue of longer and more varied experience, acquired a greater level of expertise in meeting their own legal needs. I glean from this fact no evidence of any intentional discrimination against women as a class by the state.

Id. at 11a.

In order to affirm the district court's imposition of the affirmative "sex-conscious relief," the Sixth Circuit relied not on the female inmates' right to access to courts, but rather the equal protection clause. Such reliance might have been justified if there had been a finding of an intent to discriminate by the district court. However, the

Sixth Circuit made no reference to the necessity of such a finding of an intent to discriminate.[4]

Although this Court has held that a finding of discriminatory purpose is unnecessary in Title VII cases, it has refused to extend such a principle to claims of discrimination under the equal protection clause. In *Washington v. Davis*, 426 U.S. 228, 240 (1976), this Court stated as follows:

> As the court of appeals understood Title VII, employees or applicants proceeding under it need not concern themselves with the employer's possibly discriminatory purpose but instead may focus solely on the racially different impact of the challenged hiring or promotion practices. This is not the constitutional rule. We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable to Title VII, and we decline to do so today.
>
> The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the due process clause in the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating

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[4] The Sixth Circuit was correct in concluding that in reviewing a district court's fashioning of relief where a constitutional violation is found, the standard of review is abuse of discretion. *Canterino v. Wilson, et al.*, pp. 4a-5a (Appendix to Petition for Writ of Certiorari) *citing Hoptowit v. Ray*, 682 F.2d 1237, 1245 (9th Cir. 1982). However, the error in this case is not the appropriateness of the relief afforded, but rather the elimination of the legal requirement that there must be a finding of discriminatory purpose for an equal protection claim.

> between individuals or groups. [Citation omitted]. But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects racially discriminatory purpose, is unconstitutional *solely* because it has racially disproportionate impact.

With reference to gender-based claims under the equal protection clause, this Court in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 274 (1979), applied the two-step disparate impact and discriminatory purpose analysis. The first question as this Court indicated is whether the statutory classification is indeed neutral in the sense that it is not gender-based. The second question is whether the adverse effect reflects invidious gender-based discrimination. Disparate impact provides an important starting point as to the question of invidious discrimination; however, there must be a specific finding of a discriminatory purpose. *Id.* at 274.

In upholding the district court's affirmative "sex-conscious" relief without a finding of discriminatory purpose, the Sixth Circuit has eliminated one of the elements necessary for a plaintiff to prove an equal protection claim within the context of prison litigation. This Court has not specifically dealt with the question of whether a district court must find discriminatory purpose by prison officials before affording relief under the equal protection clause to an equally identifiable group such as women or minorities. Such an issue is an important question which should be reviewed by this Court.

More significantly, the impact of the Sixth Circuit's analysis in this case goes beyond providing a part-time attorney to the Kentucky Correctional Institution for

Women so they may "catch up" with the male inmates in the frequency of their lawsuits. What if there is a disparity in other programs offered at a women's prison versus a men's prison? What about a disparity in the programs offered at a prison for inmates with mental disabilities versus a men's prison? Under the Sixth Circuit's analysis, a mere showing of a disparity is sufficient to require affirmative relief under the equal protection clause even without the showing of a discriminatory purpose. Prison officials should be given the opportunity to give legitimate reasons as to why there may be disparity in the programs between prisons. The importance of this issue cannot be underestimated and should be addressed by this Court.

II. THE DECISION OF THE SIXTH CIRCUIT IN THIS CASE CONFLICTS WITH THE DECISION OF AT LEAST ONE OTHER CIRCUIT REGARDING THE REQUIREMENT OF A FINDING OF DISCRIMINATORY PURPOSE IN AN EQUAL PROTECTION CLAIM WITHIN THE CONTEXT OF INMATE LAWSUITS.

There is a conflict between the decision of the Sixth Circuit and at least one other circuit with respect to the requirement that there must be a finding of invidious discriminatory purpose in order to maintain an equal protection claim in the prison context.

In the case of *Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989), the D.C. Circuit held that incarcerating long-term D.C. female offenders at a federal institution in West Virginia did not violate the equal protection clause even

though similarly situated male offenders were incarcerated in facilities closer to Washington, D.C. In particular, the D.C Circuit stated that the District's policy:

> does not embody invidious discrimination reflecting such forbidden factors as outmoded conceptions of the role of women in contemporary society. On the contrary, the District has demonstrated that it has sought to utilize federal resources in order to respond in some measure to the universally recognized blight of severe overcrowding that afflicts the District of Columbia prison facilities, while pursuing alternatives to alleviate the obvious hardships imposed on long-term women offenders by removing them so far from comforts and support of family and the resources that would otherwise be available to them in this community.

Id. at 1451. Judge Starr in writing the opinion for the D.C. Circuit in the *Pitts* case noted an important distinction between equal protection claims and claims for violations of individual rights:

> While an equal protection claim, too, is in one sense a personal right – i.e., the right not to be discriminated against – the claim is also a demand that governmental action that affects an individual not be predicated upon constitutionally defective reasoning. The claim charges invidiousness, rather than an unwarranted interference with constitutionally secured liberties.

Id. at 1455.

This analysis of the D.C. Circuit conflicts with the holding of the Sixth Circuit in this case. The Sixth Circuit is analyzing the plaintiffs' equal protection claim like that

of an individual right by finding that a disparity alone is sufficient to constitute a violation of the equal protection clause. In addition to disparity, there must be a finding of discriminatory purpose as stated by the D.C. Circuit.

CONCLUSION

Based upon the foregoing authorities and analyses, the amici states urge this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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